Supreme Court, U.S.
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No. 01-151

IN THE

Supreme Court of the United States

BARNES-JEWISH HOSPITAL, et al.,

Petitioners,

-and-

MARK D. ROBERTS, et al.,

Petitioners,

v.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT

BRIEF IN OPPOSITION FOR THE METROPOLITAN ST. LOUIS SEWER DISTRICT

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CORPORATE DISCLOSURE STATEMENT

Respondent, The Metropolitan St. Louis Sewer District, is a political subdivision of the State of Missouri (MSD).

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Table of Contents ii

Table of Cited Authorities v

Counter-Statement Of The Case 1

1. Introduction. 1

2. Previous litigation relevant to this case. 1

2.1 *Beatty II*: *Beatty v. MSD*, 867 S.W.2d 217 (Mo.banc 1993). 2

2.2 *Beatty III*: *Beatty v. MSD*, 914 S.W.2d 791 (Mo.banc 1995). 2

2.3 *Ring I: Ring v. MSD*, 969 S.W.2d 716 (Mo.banc 1998). 3

3. The post-*Ring I* litigation culminating in settlement. 4

4. The trial court heard substantial testimony regarding the fairness, reasonableness, and adequacy of the settlement and regarding the strength of MSD's defenses to the suit. 6

4.1 Fairness, Reasonableness, and Adequacy of the Settlement. 6

Contents

Page

4.2 The claim to interest on the amount of the overcharge. 7

4.3 MSD's defense based on its obligations under federal and state environmental laws. 8

4.4 MSD's defense based on its right to a set-off. 8

4.5 MSD's defenses based on the statute of limitations, sovereign immunity and whether this case was the proper subject of a class action suit. 9

4.6. Attorneys' Fees. 9

5. The Missouri Court of Appeals' decision in this case: *Ring v. The Metropolitan St. Louis Sewer District*, 41 S.W.3d 487 (Mo.App.E.D. 2001) ("Ring II"). 10

Reasons for Denying the Writ 11

1. Petitioners have failed to demonstrate that they timely and properly raised and preserved the federal questions which they seek review by this Court and therefore neither of petitioners' "Questions Presented" present any question reviewable by this Court. 11

Contents

Page

2. The Missouri Court of Appeals' interpretation of a Missouri procedural rule presents no federal constitutional question. 15

3. There is no constitutional right to an appeal, and therefore petitioners' assertion that the Missouri Court of Appeals' denial of appellate standing presents a federal constitutional question is without merit. ... 16

4. Petitioners' due process rights were not violated because petitioners were afforded a full and fair hearing on the merits of this case in the trial court and in the Missouri Court of Appeals such that even if their Questions Presented had been timely and properly raised, their assertions of due process violations are without merit. 17

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams Diary Co. v. National Diary Products Corp., 293 F. Supp. 1135 (W.D. Mo. 1968) 14

Beatty v. MSD, 867 S.W.2d 217 (Mo.banc 1993) .. 2

Beatty v. MSD, 914 S.W.2d 791 (Mo.banc 1995) .. 2, 3

Chandler v. Florida, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 74 (1981) 12

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L. Ed. 891 (1956) 16

International Longshoremen's Ass'n., AFL-CIO, v. Davis, 476 U.S. 380, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986) 15, 16

Keller v. Marion County Ambulance District, 820 S.W.2d 301 (Mo.banc 1991) 2

Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972) 17

Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930) 16

Ring v. MSD, 969 S.W.2d 716 (Mo.banc 1998) 3, 4, 6, 7, 8

Cited Authorities

Page

Ring v. The Metropolitan St. Louis Sewer District, 41 S.W.3d 487 (Mo. App. E.D. 2001) 10, 13, 16

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) 12, 13

Statutes:

28 U.S.C. § 1257 ..... 12, 13

28 U.S.C. § 1257(a) 12

Rules:

Fed. R. Civ. P. Rule 23 16

Missouri Rule of Civil Procedure 52.08 ..... 3, 14, 16

Missouri Rule of Civil Procedure 52.12 16

United States Supreme Court Rule 14(g)(i) ... 12, 13, 14

United States Supreme Court Rule 15.2 1

Missouri Constitution:

Article X, § 22(a) 2

COUNTER-STATEMENT OF THE CASE

1. Introduction.

MSD submits pursuant to Rule 15.2 of the Supreme Court of the United States' Rules that petitioners' statement of the case contains several misstatements which require clarification. Specifically, petitioners misstate that the plaintiff class' entitlement to 100% of the rate overcharge, to a separate award of attorneys' fees, and to prejudgment interest was res judicata by virtue of the prior Missouri Supreme Court decisions in this case. Those matters are not res judicata but remain unresolved and subject to fierce debate following nine years of continuous litigation. Therefore, MSD submits this counter-statement of the case, which includes a discussion of the relevant rulings of the Missouri Supreme Court and the Missouri Court of Appeals as well as a discussion of the viability and relative strength of MSD's defenses which provided the impetus to the parties to reach a compromise settlement. In particular, the petitioners ignore the Missouri Supreme Court's acknowledgment that a remedy for an amount less than the full rate overcharge was likely in light of MSD's financial obligations under federal and state environmental laws.

2. Previous litigation relevant to this case.

On May 13, 1992, MSD adopted an ordinance which increased certain sewer charges for the period July 1, 1992, through June 30, 1993. *LF 32.*[1] In June, 1992, class counsel

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1. The legal file submitted to the Missouri Court of Appeals is cited as "*LF* __"; the transcript of the fairness hearing conducted by the trial court on November 1, 1999, is cited as "*TR* __"; the appendix to the petition is cited as "A__"..

herein filed suit against MSD on behalf of several MSD customers, including Richard Beatty, to enjoin the implementation of the rate increase. *LF 32.* The *Beatty* plaintiffs claimed the increase was issued without approval of the voters in violation of a Missouri Constitution Amendment known as the Hancock Amendment, Article X, § 22(a). *Beatty v. MSD*, 867 S.W.2d 217, 218 (Mo.banc 1993).

2.1 *Beatty II*: *Beatty v. MSD*, 867 S.W.2d 217 (Mo.banc 1993).

In *Beatty II,* the trial court ruled that MSD's rate increase did not need to be submitted to the vote of the people and was therefore constitutional. 867 S.W.2d at 218. Upon transfer from the Missouri Court of Appeals, the Missouri Supreme Court analyzed the constitutionality of the rate increase pursuant to the five-factor test from its then recent decision in *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo.banc 1991). The Court noted that "application of the *Keller* test to the facts of this case provides no clear answer as to the nature of MSD's charges." 867 S.W.2d at 221. Nevertheless, the Court decided the ambiguity in favor of the taxpayers and held MSD's rate increase subject to the Hancock Amendment and that it therefore should have been submitted to the voters for approval. *Id.*

2.2 *Beatty III*: *Beatty v. MSD*, 914 S.W.2d 791 (Mo.banc 1995).

On remand from *Beatty II*, the trial court found that the case was actually a "representative taxpayers' suit" and ordered MSD to credit all of its customers' periodic bills as a method of refund. 914 S.W.2d at 793. On appeal by MSD,

the Missouri Supreme Court engaged in a detailed analysis of Rule 52.08, Missouri's class action rule, and held that the trial court erred with respect to the unnamed customers because they were not parties to the action. 914 S.W.2d at 795. The Court further held that "[w]hether this type of an action is suited for class action procedure is certainly worthy of consideration," and that "class proceedings certified pursuant to subsections (b)(1) or (b)(2) [of Rule 52.08], which are probably preferable in this type of lawsuit . . . do[es] not require notification nor does it allow class members to opt out." 914 S.W.2d at 796 n.3.

2.3 *Ring I: Ring v. MSD*, 969 S.W.2d 716 (Mo.banc 1998).

Ring I arose out of the subsequent class action filed by class counsel herein against MSD on behalf of the approximately 420,000 MSD customers seeking restitution of the rate increase. 969 S.W.2d at 717. The trial court dismissed the class action holding that plaintiffs' claims were barred by sovereign immunity. 969 S.W.2d at 717.

The Missouri Supreme Court in *Ring I* held that the Hancock Amendment's grant of standing to taxpayers to bring suit regarding taxes levied without voter approval operates as a waiver of sovereign immunity. 969 S.W.2d at 719. The Court remanded the case "for consideration of the merits of plaintiffs' petition." *Id.* The Court again noted, without deciding the issue, that a class action might be appropriate in this case. *Id.* The Court then concluded its opinion as follows:

> We are also confident that if the trial court determines that a class action is appropriate and

> that the plaintiffs' claims entitle them to prevail on the merits, *it will fashion a remedy that will acknowledge both the taxpayers' rights under Article X, Section 22(a), and the important obligations MSD bears under the environmental laws of the nation and state.* (Emphasis supplied).

969 S.W.2d at 719.

3. The post-*Ring I* litigation culminating in settlement.

Following remand, the parties resumed litigation. Plaintiffs filed their second amended class action petition for restitution, as well as their motion for class certification. *LF 16, 8.* In its answer, respondent MSD asserted the following affirmative defenses: (1) Failure to state a claim; (2) Statute of limitations; (3) Laches; (4) Unjust enrichment; (5) Constitutionality of the rate increase as to *non-residential* customers; (6) Set-off; (7) Sovereign immunity as applied to the claim for interest; and (8) The impropriety of a class action claim for a tax refund without specific authorization by law. *LF 28-30.*

Following submission of plaintiffs' motion for class certification, the parties entered into a course of mediation. *LF 330.* Following two days of mediation, conducted by two prominent St. Louis attorneys, the parties reached a settlement to end this litigation. *LF 330.*

On August 27, 1999, the trial court certified the plaintiffs as representatives of a settlement class comprised of all customers of MSD who were charged the rate increase. *LF 86.* The trial court preliminarily approved the settlement reached between MSD and the class. Notice of the class

certification was provided in the manner previously ordered by the court, and the notice and claim form requirements were complied with. *LF 89-91, 108.*

The trial court scheduled a fairness hearing for November 1, 1999, to determine, among other things, whether the proposed settlement should be approved by the trial court as being fair, reasonable, and adequate and whether final judgment should be entered thereon, and to consider the application of plaintiffs' counsel for the award of attorneys' fees and costs. *LF 87.* The trial court ordered that the class members be notified by mail and publication that a class action had been certified, that a preliminary settlement had been reached and that a settlement fairness hearing had been scheduled.

At the November 1, 1999, fairness hearing, the court entertained numerous motions filed by the petitioners herein, including motions for continuance, a motion to bifurcate the proceedings and motions to intervene. *TR 8-10, 12-17.* After overruling the motions for continuance, the court heard testimony from numerous witnesses in regard to the fairness, reasonableness and adequacy of the proposed settlement. *TR 10, 17, 18, 23, 47, 55, 109, 114, 125, 135, 141.* Numerous witnesses appeared and testified in support of the proposed settlement. *TR 23, 47, 55, 109, 114, 125, 135, 141.* Counsel for the petitioners herein examined the witnesses and were allowed to argue to the court petitioners' objections to the proposed settlement. *TR 9, 17-18, 37, 43, 51, 53, 89, 104, 119, 132, 140, 148, 152.* Only one witness appeared in opposition to the proposed settlement. *TR 10.* Counsel for petitioner Barnes-Jewish stated that he wanted to introduce a witness at the hearing though he would not identify the witness and only stated that the witness was important and

needed to be called at a later time. *TR 12-13.* The petitioners then introduced their only evidence, an affidavit of a paralegal which was admitted without objection.

4. The trial court heard substantial testimony regarding the fairness, reasonableness, and adequacy of the settlement and regarding the strength of MSD's defenses to the suit.

The petition largely ignores the evidence presented to the trial court regarding the fairness, reasonableness and adequacy of the settlement and the strength of MSD's defenses. Therefore, MSD submits the following summary of the testimony and evidence adduced at the fairness hearing which petitioners had a full and fair opportunity to contest.

4.1 Fairness, Reasonableness, and Adequacy of the Settlement.

The trial court heard the following testimony in support of a finding that the settlement was fair, reasonable and adequate:

a) A representative of several of MSD's largest corporate customers testified that those companies supported the settlement as being reasonable and in the public's interest. *TR 18.*

b) The chairman of a task force on MSD testified that the settlement was very reasonable because: (1) the customers will receive a refund of close to 100 percent; and (2) the retention by MSD of $8 million reflects the Missouri Supreme Court's admonition to the trial court in *Ring I* that in fashioning a remedy, due consideration should be given to MSD's obligation to comply with the environmental laws of the nation and state. *TR 18-21.*

c) An owner of one of the corporate plaintiffs-respondents testified that the settlement was a highly desirable result because: (1) there were many complex issues and no guarantee that these issues would be resolved favorably to MSD's customers; and (2) the Missouri Supreme Court's opinion in *Ring I* that any remedy should give due consideration to MSD's financial obligations under federal and state environmental laws. *TR 30, 32, 34.*

d) Class counsel herein testified that the settlement was fair to the class members because each member was to be refunded about 90 percent of their overcharge and further that the class was losing 58 members on average each day the litigation continued and had already lost as of November, 1999, 145,000 members. *TR 70, 75, 84.*

4.2 The claim to interest on the amount of the overcharge.

This issue was not res judicata. The Missouri Supreme Court in its previous decisions in this case did not decide the interest issue. The Missouri Supreme Court left open the question of whether sovereign immunity was a complete defense to the interest claim. *Ring I*, 969 S.W.2d at 719.

The trial court heard testimony that if MSD was required to pay interest on the amount of the rate overcharge, the likely result would be reduced service or another rate increase. *TR 21-22.* The trial court also heard testimony that in light of the Missouri Supreme Court's admonition to the trial court to fashion a remedy that accounted for MSD's federal and state environmental obligations, and in view of MSD's sovereign immunity defense to the interest claim, the interest issue was "up for grabs." *TR 67.*

4.3 MSD's defense based on its obligations under federal and state environmental laws.

The trial court heard testimony that because MSD spent over $20 million to meet their federal and state environmental obligations, a reasonable interpretation of the Missouri Supreme Court's admonition in *Ring I* was that the court intended that the trial court include those expenditures in its calculation of the appropriate remedy. *TR 20-21.*

Class counsel testified that: (1) the Missouri Supreme Court's statement about the environmental laws was so vague and open-ended that it in effect authorized the trial court to reduce the recovery by some unknown, unspecified amount; (2) MSD spent all the money in carrying out their responsibilities under the environmental laws of the nation and state; and (3) the Clean Water Act requires MSD to not only build new secondary treatment plants, but to operate and maintain the system every day, and every penny they spend is arguably spent in furtherance of MSD's obligations under the Clean Water Act. *TR 68-69.*

4.4 MSD's defense based on its right to a set-off.

An owner of one of the corporate class members testified that the language from the *Ring I* raised the issue of MSD's entitlement to some form of a set-off, and it created the potential for complex and contentious litigation. *TR 40-41.* Class counsel testified that set-off remained an open issue because the Missouri Supreme Court had not ruled on the issue of whether MSD was entitled to a set-off for the actual value of the service provided to its customers. *TR 64.*

4.5 MSD's defenses based on the statute of limitations, sovereign immunity and whether this case was the proper subject of a class action suit.

The trial court heard testimony that MSD was seriously pursuing its defenses. Testimony was presented that MSD was pursuing its defense that non-residential sewer charges were barred under the statute of limitations. *TR 63-64.* Class counsel testified that (1) MSD was seriously pursuing the affirmative defense of sovereign immunity; and (2) there was no Missouri Supreme Court ruling that disposed of the sovereign immunity defense on the issue of interest. *TR 64.* Class counsel testified that the Supreme Court never specifically ruled that a class action was the appropriate form for this case, and MSD still opposes this case being certified as a class action. *TR 68.*

4.6. Attorneys' Fees.

There was *no evidence* or testimony that opposed the amount or right of class counsel to recover attorneys' fees. There was substantial testimony supporting the amount of the attorneys' fee as being fair and reasonable under the circumstances of a class action which had been litigated over an 8-year period including three trips to the Missouri Court of Appeals and to the Missouri Supreme Court. *TR 30-35, 36, 42, 50, 53, 69-70, 77-79, 80-83.* Moreover, there was substantial evidence supporting the method of including the attorneys' fees in the settlement fund. *TR 88, 94, 109-111, 111-113, 119, 121-124, 127-128, 130, 134.*

5. The Missouri Court of Appeals' decision in this case: *Ring v. The Metropolitan St. Louis Sewer District*, 41 S.W.3d 487 (Mo. App. E.D. 2001) ("Ring II").

After the trial court entered judgment approving the settlement, the petitioners appealed to the Missouri Court of Appeals. *Id.* The Court held that the petitioners did not have standing to appeal the adequacy of the settlement because their motions to intervene were denied, and the Court therefore dismissed their appeal. *Id.* at 491. Nevertheless, the Court proceeded through a detailed analysis of the adequacy of the representation and of the fairness, reasonableness and adequacy of the settlement and concluded that the trial court was correct in denying the motions to intervene and in approving the settlement as fair, reasonable and adequate. *Id.* at 491-494.

Petitioners then filed a motion for rehearing or transfer to the Missouri Supreme Court which was denied by the Missouri Court of Appeals on February 22, 2001. 41 S.W.3d 47. Thereafter, petitioners filed an application for transfer to the Missouri Supreme Court which was denied on April 24, 2001. *Id.* A2. This petition follows.

REASONS FOR DENYING THE WRIT

Certiorari should be denied in this case because:

1. **Petitioners have failed to demonstrate that they timely and properly raised and preserved the federal questions which they seek review by this Court and therefore neither of petitioners' "Questions Presented" present any question reviewable by this Court.**

2. **The Missouri Court of Appeals' interpretation of a Missouri procedural rule presents no federal constitutional question.**

3. **There is no constitutional right to an appeal, and therefore petitioners' assertion that the Missouri Court of Appeals' denial of appellate standing presents a federal constitutional question is without merit.**

4. **Petitioners' due process rights were not violated because petitioners were afforded a full and fair hearing on the merits of this case in the trial court and in the Missouri Court of Appeals such that even if their Questions Presented had been timely and properly raised, their assertions of due process violations are without merit.**

1. Petitioners have failed to demonstrate that they timely and properly raised and preserved the federal questions which they seek review by this Court and therefore neither of petitioners' "Questions Presented" present any question reviewable by this Court.

The United States Supreme Court has no supervisory jurisdiction over state courts, and in reviewing a state court judgment, it is confined to evaluating it in relation to the federal

Constitution. *Chandler v. Florida,* 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 74 (1981). Title 28 U.S.C. § 1257 governs this Court's jurisdiction over final judgments or decrees by a state's highest court and provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

To satisfy Title 28 U.S.C. § 1257's jurisdictional requirements, therefore, petitioners must demonstrate that they "specially set up or claimed under the Constitution . . . of . . . the United States" those rights which petitioners now seek to have this Court review. *Id.*; *Webb v. Webb*, 451 U.S. 493, 495, 101 S. Ct. 1889, 1891, 68 L. Ed. 2d 392 (1981). The Supreme Court of the United States' Rule 14(g)(i) requires petitioners to specify:

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and

> the way in which they were passed on by those courts . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Id.

In *Webb*, this Court noted its frequent holding that when "the highest state court has failed to pass upon a federal question, it would be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Id.*

Petitioners here have failed to satisfy the requirements of 28 U.S.C. § 1257, Rule 14(g)(i), and this Court's holdings that require petitioners to demonstrate that the federal questions on which they seek review were timely and properly raised in the state court. Petitioners' effort to comply with this requirement is limited to their assertion at page 9 of their petition that they raised the procedural due process challenge to the Missouri Court of Appeals' denial of standing in their application for transfer to the Missouri Supreme Court.[2] Petitioners' effort is woefully inadequate to satisfy

2. Perhaps this explains the structural defect in the petition. The petition's cover states that petitioners are seeking a writ of certiorari to the Missouri *Supreme Court*, while the petition itself addresses only the Missouri *Court of Appeals*' opinion in *Ring II*, 41 S.W.3d 487 (Mo. App. E.D. 2001). This defect illustrates petitioners' fundamentally flawed position: That their only demonstrated attempt to raise a federal due process question was to a court that did not consider the merits of the case. The Missouri (Cont'd)

their burden to demonstrate that they timely and properly raised the purported federal questions set forth in their "Questions Presented."

The petitioners do not even attempt to demonstrate that they raised their federal due process questions in the court of first instance as required by Rule 14(g)(i) despite the numerous opportunities petitioners had. As set forth in the counter-statement of the case above, petitioners took advantage of their opportunities to plead and present their positions in the trial court by filing numerous motions and appearing and participating at the fairness hearing. Despite these opportunities, petitioners have failed to demonstrate that they presented their federal due process questions to the trial court or to the Missouri Court of Appeals where they filed four briefs and a motion for rehearing.

Petitioners acknowledge their untimely effort to raise any federal question but then attempt to excuse their untimeliness. Petitioners assert that until the Missouri Court of Appeals ruled that a party denied intervention under Rule 52.08 of Missouri's Rules of Civil Procedure has no standing to appeal, petitioners were unaware that they were

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(Cont'd)
Supreme Court merely denied transfer within its broad discretion which is much like this Court's unfettered discretion to grant or deny a petition for a writ of certiorari. In *Adams Diary Co. v. National Diary Products Corp.*, 293 F. Supp. 1135, 1150 (W.D. Mo. 1968), the court noted that the denial of a writ of certiorari by the United States Supreme Court imports no expression of opinion on the merits and the Court similarly concluded that a denial by a Missouri appellate court of an application for a discretionary extraordinary legal remedy should be viewed in much the same manner as a denial of certiorari by the Supreme Court of the United States. *Id.*

in jeopardy of being denied standing to appeal. Petitioners' assertion is belied by their own pleadings. In petitioners' motion to intervene filed on November 22, 1999, petitioners state in the opening paragraph that they sought intervention "for the purpose of objecting to the proposed settlement . . . and to further protect their rights, *including appeal rights*." *LF 311.* Moreover, MSD filed a motion to dismiss in the Missouri Court of Appeals based on petitioners' lack of appellate standing. 41 S.W.3d at 489. Petitioners' claim that they were unaware that their appellate standing was in jeopardy, until the Missouri Court of Appeals dismissed their appeal is disingenuous at best. Because petitioners were fully aware that their appellate standing was in jeopardy while this case was before the trial court and the appeals court, petitioners should have raised their federal constitutional questions before those courts in order to preserve them.

Petitioners have failed to demonstrate that they raised any federal question to the trial court or to the Missouri Court of Appeals, which was the highest Missouri court to review the merits of this case. MSD submits, therefore, that because this Court presumes that a federal question has not been timely raised if the state's highest court fails to pass upon the federal question, petitioners have failed to preserve their federal questions and this petition should be denied.

2. The Missouri Court of Appeals' interpretation of a Missouri procedural rule presents no federal constitutional question.

It is manifest that the United States Supreme Court has no authority to review state court determinations of purely state law. *International Longshoremen's Ass'n., AFL-CIO, v. Davis*, 476 U.S. 380, 387, 106 S. Ct. 1904, 1910,

90 L. Ed. 2d 389 (1986). A brief review of *Ring II*, 41 S.W.3d 487 (Mo. App. E.D. 2001), illustrates that the Missouri Court of Appeals did nothing more than interpret and construe Rules 52.12 and 52.08 of the Missouri Rules of Civil Procedure. *Id.* at 489-93. A5-10. Here, petitioners have failed to show that the Missouri court's application of these Missouri procedural rules implicates a federal question in any way. That there may be some disagreement among the federal circuits with regard to the application of Fed. R. Civ. P. Rule 23 has no bearing whatsoever on this case. Therefore, petitioners have failed to demonstrate that Missouri's requirement that they be granted leave to intervene before they have standing to appeal presents any federal issue reviewable by the United States Supreme Court.

3. There is no constitutional right to an appeal, and therefore petitioners' assertion that the Missouri Court of Appeals' denial of appellate standing presents a federal constitutional question is without merit.

This Court has repeatedly held that the due process clause of the United States Constitution does not require a state to provide appellate courts or a right to appellate review at all. *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956); *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 79 (1930). Petitioners have cited no authority from this Court, or from any other court or legislature to the contrary.

MSD submits, therefore, that because there is no federal constitutional right to an appeal, petitioners' Question Presented No. 1 fails to present a federal question reviewable by this Court.

4. Petitioners' due process rights were not violated because petitioners were afforded a full and fair hearing on the merits of this case in the trial court and in the Missouri Court of Appeals such that even if their Questions Presented had been timely and properly raised, their assertions of due process violations are without merit.

This Court has consistently held that federal due process is satisfied if a party is provided a full and fair hearing on the merits. *Lindsey v. Normet*, 405 U.S. 56, 76, 92 S. Ct. 862, 876, 31 L. Ed. 2d 36 (1972). It is undisputed that petitioners here were given a full and fair opportunity to participate in the trial court and to present evidence to the trial court supporting their positions. Petitioners chose, however, to limit their evidence to a hearsay affidavit of a paralegal. TR18

Petitioners were also given a full and fair hearing by the Missouri Court of Appeals. Although the Missouri Court of Appeals dismissed the appeal for lack of standing, the court conducted an exhaustive analysis of the fairness, reasonableness, and adequacy of the settlement, and of the adequacy of the representation by class counsel. 41 S.W.3d at 491-494. A6-16. In effect, petitioners' arguments on appeal were heard, considered and disposed of by the court. Petitioners, therefore, cannot claim that they were denied a full and fair hearing or that their due process rights were violated.

CONCLUSION

MSD respectfully submits that the petition for writ of certiorari should be denied because the petitioners failed to timely and properly raise the federal questions of which they seek this Court's review. The Missouri Court of Appeals' order denying petitioners appellate standing presents no federal constitutional question because there is no constitutional right to an appeal. Finally, petitioners' due process rights were not violated because petitioners were given a full and fair hearing on the merits of this case at the trial court and in the Missouri Court of Appeals.

MSD respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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